

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	:	
	:	
Petition for declaration of service currently	:	
provided under Rate 6L to 3 MW and greater	:	No. 02-0479
customers as a competitive service pursuant to:	:	
Section 16-113 of the Public Utilities Act and	:	
approval of related tariff amendments.	:	

BRIEF ON EXCEPTIONS
OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

Pursuant to 83 Ill. Adm. Code 200.800, the Staff of the Illinois Commerce Commission (“Staff” and “Commission”), by and through its attorneys, hereby files its Brief on Exceptions in the above-captioned proceeding. This Brief on Exceptions is principally intended to respond to the direction to parties in the Administrative Law Judge’s Proposed Order (“PO”) to provide a complete and thorough discussion of Rate HEP *vis-a-vis* the delivery services transition charge (citing relevant statutory provisions and applicability), and to address the interrelated nature of transition charges and the mitigation factor. PO, p. 10.

I. Transition Charge/Mitigation Factor

A. Restructuring

On December 16, 1997, Public Act 90-561 took effect, making sweeping changes in the regulation of the Illinois electric industry. Before that date, the electric utility industry had been subject to regulation in much the same fashion as other public utilities under Articles I through X of the Public Utilities Act (“PUA”). Electric utilities were obliged to provide bundled electric service to all customers in their respective service areas under tariffs in place under Article IX.

As a result of the 1997 amendments to the PUA, Illinois electric utilities were required to provide certain services not previously required by statute, including unbundled delivery services and real time pricing. 220 ILCS 5/16-108 and 16-107, respectively. At the same time, the General Assembly created a statutory mechanism whereby an electric utility could seek to be relieved of the obligation to provide traditional bundled electric service to classes of its customers. It is under this provision, PUA Section 16-113(a), that the Commission heard Phase 1 of this proceeding.

The ongoing service obligations of Illinois electric utilities are set forth in PUA Section 16-103. 220 ILCS 5/16-103. Electric utilities are not required to provide bundled services under tariffs in place on December 16, 1997, to customers for whom the service has been declared competitive under Section 16-113. They are required, however, to provide delivery services in accordance with Article XVI, power purchase options in accordance with Section 16-110, and real-time pricing in accordance with Section 16-107. 220 ILCS 5/16-103(b).

Electric utilities were required to begin offering real-time pricing October 1, 1998. 220 ILCS 5/16-107. Real-time pricing is a bundled service option which electric utilities are required to provide regardless of whether a service has been declared competitive. Real-time pricing is governed by Article IX. 220 ILCS 5/16-107(c).

B. Transition Charges

Electric utilities are expressly entitled but not required to implement transition charges “in conjunction with the offering of delivery services pursuant

to Section 16-104.” 220 ILCS 5/16-108(f). To the extent the electric utility implements transition charges, “it shall implement such charges for *all delivery services customers...*” Id., emphasis added.

Electric utilities are also permitted to file tariffs that allow them to collect transition charges from customers that do not take delivery services but that take electric service from an alternative retail electric supplier or from an electric utility other than the electric utility in whose service area the customer is located. 220 ILCS 5/16-108(h). Customers who take service from an electric utility under the PUA Section 16-110 delivery services customer power purchase options (also mentioned in Section 16-103(a)—see above) are by definition delivery services customers, and are clearly obligated by Sections 16-108(f), 16-110(b), (c) and (d) to pay transition charges, all under the formula for transition charges in the definition of that term in PUA Section 16-102. 220 ILCS 5/16-102.

C. Mitigation Factor

The mitigation factor is one component of the calculations that drive the transition charge payable by a delivery services customer of an electric utility that has chosen to implement transition charges. Essentially, the “transition charge” as defined in PUA Section 16-102 is a charge expressed in cents per kilowatt-hour calculated for a customer or a class of customers. The calculation begins with the annual revenue the electric utility would receive from the customer if the customer continued to take the same amount of electricity at the same rates in effect for that customer before it became eligible for delivery services. From that amount is subtracted the amount of revenue the utility can expect from the

customer for delivery services under delivery services rates for the same annual amount of electricity. A further subtraction is made for the market value of the electricity the utility would have used to supply the customer if it had not become an electric utility. The final subtraction is the “mitigation factor,” statutorily stated to represent the amount to be attributed to new revenue sources and cost reductions by the utility (although some have referred to the mitigation factor as a “shopping credit” that should offer a customer a reason to become a delivery services customer). The result of these subtractions is then divided by the customer’s usage in kilowatt-hours for the year, to arrive at the cents per kilowatt-hour amount the utility is entitled to charge the customer. The transition charge amount can never be less than zero (which would in effect require a utility to pay a customer to leave its bundled service).

Unlike the delivery services charge component of the transition charge, the PUA does not contemplate the imposition of a transition charge without the mitigation factor. If an electric utility that has implemented transition charges files tariffs to do so, it may collect a transition charge that does not reflect the subtraction of delivery services charges for a customer that takes service from an alternative retail electric supplier or an electric utility other than the incumbent, but does not take delivery services from the electric utility. It may also collect such transition charges on a lump sum basis. Section 16-111(h) of the PUA expressly so provides.

D. Summary

By contrast with each of the Sections under which transition charges are defined, implemented, tarified, and collected, Section 16-107 makes no mention of transition charges. Section 16-107(c) leaves no question as to the standard the Commission is to apply to real time pricing: “The electric utility’s tariff or tariffs filed pursuant to this Section shall be subject to Article IX.” Thus, traditional precepts governing the Commission establishment of just and reasonable utility rates, and not the provisions permitting the implementation of transition charges, govern real time pricing tariffs such as Rate HEP.

The PUA does not contemplate transition charges being imposed on any customers of an electric utility except delivery services customers. Utilities choosing to implement transition charges must calculate the transition charges under the formula provided in Section 16-102. 220 ILCS 5/16-102. The formula includes a mitigation factor. The mitigation factor acts to lower the transition charge and increases over time. The alternative Rate HEP proposed by ComEd in the surrebuttal testimony of Alongi and the supplemental testimony of Crumrine does not include a mitigation factor.

ComEd’s alternative Rate HEP improperly includes a transition charge for customers taking bundled service through the real-time pricing tariff. Additionally, even if there was authority for imposition of a transition charge on bundled service customers, ComEd has not included the mitigation factor in its calculation of the transition charge.

ComEd's principal argument for the addition of transition charges to otherwise permitted charges under real time pricing is the fact that the Commission permitted the creation of Rate HEP in 1998 in a manner that permitted "revenue neutrality" with otherwise applicable rates such as Rate 6L. The Commission simply is not bound by this determination, especially where, as here, circumstances have so dramatically changed since 1998.

II. Revenue Neutrality

In its Initial Brief, the Company stated: "[i]n Docket 98-0362, the Commission approved Rate HEP and concluded that, as designed, Rate HEP met the requirements of Section 16-107 of the PUA. " PO quoting Docket 98-0362 Order, p. 11. ComEd further asserts that Staff agreed that the "revenue neutral design of Rate HEP met the Article IX "just and reasonable" requirements." Id. ComEd asserts in the present docket that Staff's proposed Rate HEP design violates the revenue neutrality principle that the Commission previously approved.

The Proposed Order correctly finds that there are factual differences between the Commission's original approval of Rate HEP in Docket 98-0362 and the matter presently before the Commission. PO, p. 10. Furthermore, the Proposed Order properly concludes that revenue neutrality is no longer a valid basis upon which to determine Rate HEP charges. PO, p. 10. The Proposed Order reaches the correct conclusion in that while Rate HEP was originally approved by the Commission in Docket 98-0362, in the present docket the

Commission must reevaluate whether the proposed Rate HEP satisfies the “just and reasonable” requirements of Article IX.

ComEd fails to recognize that previous Commission orders have no *res judicata* effect in subsequent proceedings. The Commission is not a judicial body, rather it is a regulatory body, and as such it must have the authority to address each matter before it freely, even if the matter addresses issues identical to those in the previous case. Illinois-American Water Co. v. Illinois Commerce Comm’n, 322 Ill. App. 3d 365, 368 (2001). Even if a Commission order is a departure from a prior decision, it is squarely within its authority to arrive at two different determinations in two separate cases that have different sets of facts. See also Mississippi River Fuel Corp. v. Illinois Commerce Comm’n, 1 Ill. 2d 509, 513 (1953), (the concept of public regulation includes of necessity the philosophy that the [C]ommission shall have power to deal freely with each situation as it comes before it, regardless of how it may have dealt with a similar or even the same situation in a previous proceeding). Thus, previous Commission action purporting to support the principle of revenue neutrality is not dispositive in the present case.

III. Conclusion

The Proposed Order adopts a proper rate structure for Rate HEP and should be approved by the Commission.

Respectfully submitted,



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